Commonwealth of Virginia
Procedures

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I. Introduction

The Public-Private Education Facilities and Infrastructure Act of 2002 (the "PPEA")¹ allows responsible public entities to create public-private partnerships for development of a wide range of projects for public use if the public entities determine there is a need for the project and that private involvement may provide the project to the public in a timely and cost-effective fashion. For purposes of the PPEA, the Commonwealth of Virginia, its agencies and institutions taken together, is a "responsible public entity" that "has the power to acquire, design, construct, improve, renovate, expand, equip, maintain, or operate the applicable qualifying project."² Individually negotiated comprehensive agreements between an operator and the Commonwealth will define the respective rights and obligations of the parties. This document sets forth the procedures to guide the private partner(s), and to be followed by each agency and institution of the Commonwealth, in the application of PPEA. The approval of the Governor of the Commonwealth of Virginia is required for any state agency or institution to enter into a comprehensive agreement pursuant to the PPEA.

In order for a project to be considered under the PPEA, it must meet the definition of a "qualifying project." The PPEA contains a broad definition of "qualifying project" that includes public buildings and facilities of all types; for example:

- (i) An education facility, including, but not limited to, a school building, any functionally-related and subordinate facility (a stadium, for example), land appurtenant to a school building, and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education;
- (ii) A building or facility for principal use by any public entity;
- (iii) Improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity;
- (iv) Utility, telecommunications and other communications infrastructure; or
- (v) A recreational facility; and
- (vi) Certain service contracts.

The PPEA establishes requirements that the Commonwealth's agencies and institutions shall adhere to when considering proposals received pursuant to the PPEA. Individual state agencies or institutions are the cognizant units of the Commonwealth as a

¹ Virginia Code § 56-575.1 through § 56-575.16.

² Ibid

³ Virginia Code § 56-575.16

responsible public entity as defined in the PPEA. They may receive and consider proposals in strict accord with the procedures specified in this document. In addition, the PPEA specifies the criteria that must be used to select a proposal and the contents of the comprehensive agreement detailing the relationship between the Commonwealth and the private entity.

The complete text of the PPEA has been included in the Appendix to this document. Although guidance with regard to the application of the PPEA is provided in this document, it is incumbent upon all entities, both public and private, to comply with the provisions of the PPEA.

II. General Provisions

A. Proposal Submission

A proposal may be either solicited by the Commonwealth or delivered by a private entity on an unsolicited basis. Proposers will be required to follow a two-part proposal submission process consisting of an initial conceptual phase (Part 1) and a detailed phase (Part 2). The initial phase of the proposal should contain specified information on proposer qualifications and experience, project characteristics, project financing, anticipated public support or opposition, or both, and project benefit and compatibility. The Part 2 detailed proposal must contain specified deliverables.

The PPEA allows private entities to include innovative financing methods, such as the imposition of user fees or service payments, in a proposal. Such financing arrangements may include the issuance of debt instruments, equity or other securities or obligations, including, if applicable, the portion of the tax-exempt private activity bond limitation amount to be allocated annually to the Commonwealth of Virginia pursuant to the federal Economic Growth and Tax Relief Reconciliation Act of 2001⁴ for the development of education facilities using public-private partnerships, and to provide for carryovers of any unused limitation amount.

Proposals should be prepared simply and economically, providing a concise description of the proposer's capabilities to complete the proposed qualifying project and the benefits to be derived from the project by the public. Project benefits to be considered are those occurring during the construction, renovation, expansion or improvement phase and during the life cycle of the project. Proposals also should include a comprehensive scope of work and a financial plan for the project, which contains enough detail to allow an analysis by the Commonwealth of the financial feasibility of the proposed project. For specific applications, the Commonwealth may request, in writing, clarification to the submission.

The PPEA is intended to encourage proposals from the private sector that offer the provision of private financing in support of the proposed public project and the

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⁴ Public Law 107-16; Section 142(k)(5) of the Internal Revenue Code of 1986, as amended.

assumption of commensurate risk by the private operator, but also benefits to the operator through innovative approaches to project financing, development and use. However, while substantial private sector involvement is encouraged, qualifying facilities will still be devoted primarily to *public* use and typically involve facilities critical to the public health, safety and welfare. Accordingly, Commonwealth agencies and institutions shall continue to exercise full and proper due diligence in the evaluation and selection of operators for these projects. In this regard, the qualifications, capabilities, resources and other attributes of a prospective operator and its whole team should be carefully examined for every project. In addition, operators proposing projects shall be held strictly accountable for representations or other information provided regarding their qualifications, experience or other contents of their proposals, including all specific aspects of proposed plans to be performed by the operator.

B. Affected Local Jurisdictions

Any private entity requesting approval from, or submitting a conceptual or detailed proposal to, the Commonwealth must provide each affected unit of local government with a copy of those portions of the private entity's request or proposal that are not deemed confidential by the state agency by certified mail, express delivery or hand delivery, after the agency or institution determines whether to accept such proposal. Affected local jurisdictions shall have 60 days from the receipt of the request or proposal to submit written comments to the responsible state agency or institution at either or both the conceptual and detailed phases. Comments received within the 60-day period shall be considered in evaluating the request or proposal, however no negative inference shall be drawn from the absence of comment by an affected local jurisdiction.

C. Proposal Review Fee

No fee will be charged by the Commonwealth to process, review or evaluate any solicited proposal submitted under the PPEA, other than what are considered reasonable and incidental permit, utility, and related fees during the construction stage of the project.

The Commonwealth shall charge a fee of one-half of one percent (0.5%), not to exceed \$50,000, of the estimated present value cost to the Commonwealth of the proposal, but not less than \$5,000, to cover the costs of processing, reviewing, and evaluating any unsolicited, Part 1 proposal or competing unsolicited Part 1 proposal submitted under the PPEA. For purposes of initial processing of the proposal, the agency or institution shall accept the \$5,000 minimum fee with the balance due and payable prior to the proposals proceeding beyond the initial review stage. Such sums shall be paid with certified funds, and shall be deposited in the State Treasury on the books of the Comptroller in a special statewide fund known as the PPEA Fund. The fund shall be established for such purpose, and deposits to the fund shall be apportioned to defray the direct cost of proposal review(s).

• If the cost of reviewing the proposal is less than the established proposal fee, the public entity may refund to the proposer the excess fee.

- If during the initial review the agency or institution decides not to proceed to publication and conceptual-phase review of an unsolicited proposal, the proposal fee, less any direct (itemized) costs of the initial review, shall be refunded to the private entity.
- If the agency or institution chooses to proceed with evaluation of proposal(s) under the PPEA, it shall not do so until the entire, non-refundable proposal fee has been paid to the Commonwealth in full.

D. Freedom of Information Act

Generally, proposal documents submitted by private entities are subject to the Virginia Freedom of Information Act ("FOIA").⁵ In accordance with § 2.2-3705 A 56 of the Code, such documents may be released if requested, except to the extent that they relate to (i) confidential proprietary information submitted to the Commonwealth under a promise of confidentiality or (ii) memoranda, working papers or other records related to proposals if making public such records would adversely affect the financial interest of the Commonwealth or the private entity or the bargaining position of either party.

Subsection 56-575.4 G of the PPEA imposes an obligation on the Commonwealth, and any affected local jurisdiction, to protect confidential proprietary information submitted by a private entity or operator. When the private entity requests that the public entity not disclose information, the private entity must (i) invoke the exclusion when the data or materials are submitted to the public entity or before such submission, (ii) identify the data and materials for which protection from disclosure is sought, and (iii) state why the exclusion from disclosure is necessary. A private entity may request and receive a determination from the Commonwealth as to the anticipated scope of protection prior to submitting the proposal. The Commonwealth is authorized and obligated to protect only confidential proprietary information, and thus will not protect any portion of a proposal from disclosure if the entire proposal has been designated confidential by the proposer without reasonably differentiating between the proprietary and non-proprietary information contained therein.

Upon receipt of a request that designated portions of a proposal be protected from disclosure as confidential and proprietary, the state agency or institution, as the case may be, shall determine whether such protection is appropriate under applicable law and, if appropriate, the scope of such appropriate protection, and shall communicate its determination to the proposer. If the determination regarding protection or the scope thereof differs from the proposer's request, then the Commonwealth should accord the proposer a reasonable opportunity to clarify and justify its request. Upon a final determination by the agency or institution to accord less protection than requested by the proposer, the proposer should be accorded an opportunity to withdraw its proposal. A proposal so withdrawn should be treated in the same manner as a proposal not accepted for publication and conceptual-phase consideration as provided in section IV.A.2 below.

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⁵ Virginia Code § 2.2-3700 et seq.

E. Applicability of Other Laws

The applicability of the Virginia Public Procurement Act (the "VPPA") is as set forth in the PPEA. In soliciting or entertaining proposals under the PPEA, agencies and institutions of the Commonwealth shall also comply with all applicable federal laws and applicable state and local laws not in conflict with the PPEA. Likewise, in submitting proposals and in developing, executing or operating facilities under the PPEA, operators shall comply will all applicable federal laws and applicable state and local laws. Such laws may include, but not necessarily be limited to, contractual obligations which require Workers Compensation insurance coverage, performance bonds or payment bonds from approved sureties, compliance with the Virginia Prompt Payment Act, compliance with the Ethics in Public Contracting Act and compliance with environmental laws, workplace safety laws, and state or local laws governing contractor or trade licensing, building codes and building permit requirements.

Expenditure of state funds in support of a comprehensive agreement requires an appropriation in the state budget or other appropriation(s) act.

The PPEA process should not be used to create state-supported debt. Comprehensive agreements involving any form of state-supported debt, require specific, project-level approval by the General Assembly, the Governor, and the Treasury Board.

A state agency or institution considering a solicited or unsolicited proposal shall be responsible for complying with the provisions of § 10.1-1188 of the Code of Virginia as it regards environmental issues.

In accordance with existing state law, or pursuant to a directive from the Governor's Office, other Commonwealth agencies or institutions may also have a right and responsibility to monitor project and the operator's compliance with the terms of the comprehensive agreement.

III. Solicited Proposals

With the written authorization of the head of the state agency or institution a Request for Proposals (RFPs) may be issued, inviting proposals from private entities to acquire, construct, improve, renovate, expand, maintain or operate qualifying projects or to design or equip projects so constructed, improved renovated, expanded, maintained or operated. The agency or institution shall use a two-part proposal process consisting of an initial conceptual phase (Part 1) and a detailed phase (Part 2). The RFP shall invite proposers to submit proposals on individual projects identified by the state agency or institution. In such a case the Commonwealth shall set forth in the RFP the format and supporting information that is required to be submitted, consistent with the provisions of the PPEA.

The RFP should specify, but not necessarily be limited to, information and documents that must accompany each proposal and the factors that will be used in evaluating the submitted proposals. The RFP shall be posted on the Commonwealth's electronic procurement website, http://www.eva.state.va.us/. Notices shall also be published in a newspaper or other publications of general circulation and advertised on the *Virginia Business Opportunities Newsletter* website. The RFP should also contain or incorporate by reference applicable Virginia standard terms and conditions, including any unique capabilities or qualifications that will be required of the private entities submitting proposals. Pre-proposal conferences may be held as deemed appropriate by the Commonwealth.

IV. Unsolicited Proposals

The PPEA permits the Commonwealth's agencies and institutions to receive, evaluate and select for negotiations unsolicited proposals from private entities to acquire, construct, improve, renovate, expand, maintain, or operate a qualifying project or to design or equip projects so constructed, improved, renovated, expanded, maintained or operated.

From time to time the Commonwealth's agencies or institutions may publicize their needs and may encourage interested parties to submit proposals subject to the terms and conditions of the PPEA. When such proposals are received without issuance of an RFP, the proposal shall be treated as an <u>unsolicited proposal</u>. Unsolicited proposals should be submitted to the head of the affected state agency or institution, and delivery confirmed for the submitter by written receipt. If proposal clearly affects multiple state agencies, institutions and/or interests, or if there exists uncertainty which agency or institution is best suited to receive the proposal, it should be submitted to the Secretary of Administration.

A. Decision to Accept and Consider Unsolicited Proposal; Notice

- 1. The Commonwealth reserves the right to reject any and all proposals at any time.
- 2. Upon receipt of any unsolicited proposal, or group of proposals, and payment of the required fee by the proposer or proposers, the agency or institution should determine whether to accept the unsolicited proposal for publication and conceptual-phase consideration. If the agency or institution determines not to accept the proposal, it shall return the proposal, together with all fees and accompanying documentation, to the proposer.
- 3. a. If the agency or institution chooses to accept an unsolicited proposal for conceptual-phase consideration, it shall post a notice on the Commonwealth's electronic procurement website, http://www.eva.state.va.us/, and in such other public area(s) as may be regularly used for posting of public notices, for a period of not less than 45

days. The responsible agency or institution shall also publish, at least once, the same notice in one or more newspapers or periodicals of general circulation in the affected jurisdiction(s), providing notice of pending or potential action in not less than 45 days. The agency shall provide for more than 45 days in situations where the scope or complexity of the original proposal warrants additional time for potential competitors to prepare proposals. In addition, the notice should also be advertised on the *Virginia Business Opportunities Newsletter* website.

- b. The notice shall state that the agency or institution (i) has received and accepted an unsolicited proposal under the PPEA, (ii) intends to evaluate the proposal, (iii) may negotiate a comprehensive agreement with the proposer based on the proposal, and (iv) will accept for simultaneous consideration any competing proposals that comply with the procedures adopted by the Commonwealth and the provisions of the PPEA. The notice will summarize the proposed qualifying project or projects, and identify their proposed locations. Copies of unsolicited proposals shall be available upon request, subject to the provisions of FOIA and § 56-575.4 G of the PPEA.
- c. Prior to posting of the notices provided for in this subsection the agency or institution shall receive from the private partner or partners the balance due, if any, of the required project proposal review fee.

B. Initial Review by the Commonwealth at the Conceptual Stage (Part 1)

After reviewing the original proposal, and any competing proposals submitted during the notice period, the agency or institution may recommend to the responsible Cabinet Secretary, or the Governor:

- (i) not to proceed further with any proposal,
- (ii) to proceed to the detailed (Part 2) phase of review with the original proposal,
- (iii) to proceed to the detailed (Part 2) phase with a competing proposal, or
- (iv) to proceed to the detailed (Part 2) phase with multiple proposals.

The responsible Cabinet Secretary, or the Governor (if there is not a responsible Cabinet Secretary), shall approve, in writing, in advance, the course of action to be implemented by the agency or institution, after considering the comments of Secretaries of Finance and Administration.

In the event that more than one proposal will be considered in the detailed (Part 2) phase of review, the agency or institution shall determine whether the unsuccessful private entity, or entities, shall be reimbursed, in whole or in part, for costs incurred in the

detailed phase of review. In such case reasonable costs may be assessed to the successful proposer as part of any ensuing comprehensive agreement.

V. Review of Solicited and Unsolicited Proposals

- 1. Only proposals complying with the requirements of the PPEA that contain sufficient information for a meaningful evaluation and that are provided in an appropriate format will be considered by the agency or institution for further review at the conceptual stage. Formatting suggestions for proposals at the conceptual stage are found at Section VI A.
- 2. The agency or institution will determine at the initial review stage whether it will proceed using:
 - a. Standard procurement procedures consistent with the VPPA; or
 - b. Procedures developed that are consistent with procurement of other than professional services through "competitive negotiation" as the term is defined in § 2.2-4301 of the Code of Virginia (competitive negotiation). The agency or institution may proceed using such procedures only if it makes a <u>written determination</u> that doing so is likely to be advantageous to the Commonwealth and the public based upon either (i) the probable scope, complexity or urgency of need, or (ii) the risk sharing, added value, increase in funding or economic benefit from the project would otherwise not be available.

When an agency or institution elects to use competitive negotiations, its written determination should consider factors such as risk sharing, added value and/or economic benefits from the project that would not be available without competitive negotiation. In addition, the written determination should explain how the scope, complexity, and/or urgency of the project are such that competitive negotiation is determined necessary.

VI. Proposal Preparation and Submission

A. Format for Submissions at Conceptual Stage (Part 1)

The Commonwealth requires that proposals at the conceptual stage contain information in the following areas: (i) qualifications and experience, (ii) project characteristics, (iii) project financing, (iv) anticipated public support or opposition, or both, (v) project benefit and compatibility and (vi) such additional information as may seem prudent which is not inconsistent with the requirements of the PPEA. Suggestions for formatting information to be included in proposals at the Conceptual Stage include:

1. Qualification and Experience

- a. Identify the legal structure of the firm or consortium of firms making the proposal. Identify the organizational structure for the project, the management approach and how each partner and major subcontractor (\$1 million or more) in the structure fits into the overall team. All members of the operator/offeror's team, including major subcontractors known to the proposer must be identified at the time a proposal is submitted for the Conceptual Stage. Identified team members, including major subcontractors (over \$5 million), may not be substituted or replaced once a project is approved and comprehensive agreement entered into, without the written approval of the Commonwealth. Include the status of the Virginia license of each partner, proposer, contractor, and major subcontractor.
- b. Describe the experience of the firm or consortium of firms making the proposal and the key principals involved in the proposed project including experience with projects of comparable size and complexity. Describe the length of time in business, business experience, public sector experience and other engagements of the firm or consortium of firms. Describe the past safety performance record and current safety capabilities of the firm or consortium of firms. Describe the past technical performance history on recent projects of comparable size and complexity, including disclosure of any legal claims, of the firm or consortium of firms. Include the identity of any firms that will provide design, construction and completion guarantees and warranties and a description of such guarantees and warranties.
- c. For each firm or major subcontractor (\$1 million or more) that will be utilized in the project, provide a statement listing all of the firm's prior projects and clients for the past 3 years and contact information for same (names/addresses /telephone numbers). If a firm has worked on more than ten (10) projects during this period, it may limit its prior project list to ten (10), but shall first include all projects similar in scope and size to the proposed project and, second, it shall include as many of its most recent projects as possible. Each firm or major subcontractor shall be required to submit all performance evaluation reports or other documents which are in its possession evaluating the firm's performance during the preceding three years in terms of cost, quality, schedule maintenance, safety and other matters relevant to the successful project development, operation, and completion.

- d. Provide the names, addresses, and telephone numbers of persons within the firm or consortium of firms who may be contacted for further information.
- e. Provide a current or most recently audited financial statement of the firm or firms and each partner with an equity interest of twenty percent or greater.
- f. Identify any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2.
- g. Identify proposed plan for obtaining sufficient numbers of qualified workers in all trades or crafts required for the project.
- h. Provide information on any training programs, including but not limited to apprenticeship programs registered with the U.S. Department of Labor or a State Apprenticeship Council, in place for employees of the firm and employees of any member of a consortium of firms.
- i. Provide information on the level of commitment by the firm or consortium of firms to use Department of Minority Business Enterprise firms in developing and implementing the project.
- j. For each firm or major subcontractor that will perform construction and/or design activities, provide the following information:
 - (1) A sworn certification by an authorized representative of the firm attesting to the fact that the firm is not currently debarred or suspended by any federal, state or local government entity.
 - (2) A completed qualification statement on a form developed by the Commonwealth that reviews all relevant information regarding technical qualifications and capabilities, firm resources and business integrity of the firm, including but not limited to, bonding capacities, insurance coverage and firm equipment. This statement shall also include a mandatory disclosure by the firm for the past three years any of the following conduct:
 - (A) bankruptcy filings
 - (B) liquidated damages
 - (C) fines, assessments or penalties
 - (D) judgments or awards in contract disputes

- (E) contract defaults, contract terminations
- (F) license revocations, suspensions, other disciplinary actions
- (G) prior debarments or suspensions by a governmental entity
- (H) denials of prequalification, findings of non-responsibility
- (I) safety past performance data, including fatality incidents, "Experience Modification Rating," "Total Recordable Injury Rate" and "Total Lost Workday Incidence Rate"
- (J) violations of any federal, state or local criminal or civil law
- (K) criminal indictments or investigations
- (L) legal claims filed by or against the firm
- k. <u>Worker Safety Programs:</u> Describe worker safety training programs, jobsite safety programs, accident prevention programs, written safety and health plans, including incident investigation and reporting procedures.

2. Project Characteristics

- a. Provide a description of the project, including the conceptual design. Describe the proposed project in sufficient detail so that type and intent of the project, the location, and the communities that may be affected are clearly identified.
- b. Identify and fully describe any work to be performed by the public entity.
- c. Include a list of all federal, state and local permits and approvals required for the project and a schedule for obtaining such permits and approvals.
- d. Identify any anticipated adverse social, economic and environmental impacts of the project. Specify the strategies or actions to mitigate known impacts of the project. Indicate if an environmental and archaeological assessment have been completed.
- e. Identify the projected positive social, economic and environmental impacts of the project.
- f. Identify the proposed schedule for the work on the project, including the estimated time for completion.
- g. Identify contingency plans for addressing public needs in the event that all or some of the project is not completed according to projected schedule.

- h. Propose allocation of risk and liability for work completed beyond the agreement's completion date, and assurances for timely completion of the project.
- i. State assumptions related to ownership, legal liability, law enforcement and operation of the project and the existence of any restrictions on the public entity's use of the project.
- j. Provide information relative to phased or partial openings of the proposed project prior to completion of the entire work.

3. Project Financing

- a. Provide a preliminary estimate and estimating methodology of the cost of the work by phase, segment, or both.
- b. Submit a plan for the development, financing and operation of the project showing the anticipated schedule on which funds will be required. Describe the anticipated costs of and proposed sources and uses for such funds. Include any supporting due diligence studies, analyses or reports.
- c. Include a list and discussion of assumptions underlying all major elements of the plan.
- d. Identify the proposed risk factors and methods for dealing with these factors.
- e. Identify any local, state or federal resources that the proposer contemplates requesting for the project. Describe the total commitment, if any, expected from governmental sources and the timing of any anticipated commitment.

4. Project Benefit and Compatibility

- a. Identify community benefits, including the economic impact the project will have on the Commonwealth and local community in terms of amount of tax revenue to be generated for the Commonwealth and political subdivisions, the number jobs generated for Virginia residents and level of pay and fringe benefits of such jobs, the training opportunities for apprenticeships and other training programs generated by the project and the number and value of subcontracts generated for Virginia subcontractors.
- b. Identify any anticipated public support or opposition, as well as any anticipated government support or opposition, for the project;

- c. Explain the strategy and plan that will be carried out to involve and inform the general public, business community, local governments, and governmental agencies in areas affected by the project;
- d. Describe the compatibility of the project with local, regional, and state economic development efforts.
- e. Describe the compatibility with the local comprehensive plan, local infrastructure development plans, and any capital improvements budget or other government spending plan.

B. Format for Submissions at Detailed Stage (Part 2)

If the Commonwealth decides to proceed to the detailed phase of review with one or more proposals, the following information, where applicable, shall be provided by the private entity unless a waiver of the requirement or requirements is agreed to by the cognizant agency or institution:

- 1. A topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project;
- 2. Conceptual site plan indicating proposed location and configuration of the project on the proposed site;
- 3. Conceptual (single line) plans and elevations depicting the general scope, appearance and configuration of the proposed project;
- 4. Detailed description of the proposed participation, use and financial involvement of the State, agency and/or locality in the project. Include the proposed terms and conditions for the project if they differ from the standard state General Conditions;
- 5. A list of public utility facilities, if any, that will be crossed by the qualifying project and a statement of the plans of the proposer to accommodate such crossings;
- 6. A statement and strategy setting out the plans for securing all necessary property. The statement must include the names and addresses, if known, of the current owners of the subject property as well as a list of any property the proposer intends to request the public entity to condemn;
- 7. A detailed listing of all firms that will provide specific design, construction and completion guarantees and warranties, and a brief description of such guarantees and warranties;

- 8. A total life-cycle cost specifying methodology and assumptions of the project or projects and the proposed project start date. Include anticipated commitment of all parties; equity, debt, and other financing mechanisms; and a schedule of project revenues and project costs. The life-cycle cost analysis should include, but not be limited to, a detailed analysis of the projected return, rate of return, or both, expected useful life of facility and estimated annual operating expenses.
- 9. A detailed discussion of assumptions about user fees or rates, and usage of the projects.
- 10. Identification of any known government support or opposition, or general public support or opposition for the project. Government or public support should be demonstrated through resolution of official bodies, minutes of meetings, letters, or other official communications.
- 11. Demonstration of consistency with appropriate local comprehensive or infrastructure development plans or indication of the steps required for acceptance into such plans.
- 12. Explanation of how the proposed project would impact local development plans of each affected local jurisdiction.
- 13. Description of an ongoing performance evaluation system or database to track key performance criteria, including but not limited to, schedule, cash management, quality, worker safety, change orders, and legal compliance.
- 14. Identification of any known conflicts of interest or other disabilities that may impact the public entity's consideration of the proposal, including the identification of any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2.
- 15. Acknowledge conformance with Sections 2.2 4367 thru 2.2-4377 of the Code of Virginia, the Ethics in Public Contracting Act;
- 16. Additional material and information as the public entity may reasonably request.

VII. Proposal Evaluation and Selection Criteria

The following items shall be considered in the evaluation and selection of PPEA proposals. In selecting proposals, all relevant information from both the Conceptual Stage and the Detailed Stage should be considered.

A. Qualifications and Experience

Factors to be considered in either phase of an agency or institution's review to determine whether the proposer possesses the requisite qualifications and experience should include:

- 1. Experience, training and preparation with similar projects;
- 2. Demonstration of ability to perform work;
- 3. Demonstrated record of successful past performance, including timeliness of project delivery, compliance with plans and specifications, quality of workmanship, cost-control and project safety;
- 4. Demonstrated conformance with applicable laws, codes, standards, regulations, and agreements on past projects;
- 5. Leadership structure;
- 6. Project manager's experience;
- 7. Management approach;
- 8. Project staffing plans, the skill levels of the proposed workforce, apprenticeship and other training programs offered for the project, and the proposed safety plans for the project;
- 9. Financial condition; and
- 10. Project ownership.

B. Project Characteristics

Factors to be considered in determining the project characteristics include:

- 1. Project definition;
- 2. Proposed project schedule;

- 3. Operation of the project;
- 4. Technology, technical feasibility;
- 5. Conformity to laws, regulations, and standards;
- 6. Environmental impacts;
- 7. Condemnation impacts;
- 8. State and local permits; and
- 9. Maintenance of the project.

C. Project Financing

Factors to be considered in determining whether the proposed project financing allows adequate access to the necessary capital to finance the project include:

- 1. Cost and cost benefit to the responsible public entity;
- 2. Financing and the impact on the debt or debt burden of the responsible public entity;
- 3. Financial plan, including overall feasibility and reliability of plan; operator's past performance with similar plans and similar projects; degree to which operator has conducted due diligence investigation and analysis of proposed financial plan and results of any such inquiries or studies.
- 4. Estimated cost; and
- 5. Life-cycle cost analysis.

D. Project Benefit and Compatibility

Factors to be considered in determining the proposed project's compatibility with the appropriate local or regional comprehensive or development plans include:

1. Community benefits, including the economic impact the project will have on the Commonwealth and local community in terms of amount of tax revenue to be generated for the Commonwealth and political subdivisions, the number jobs generated for Virginia residents and level of pay and fringe benefits of such jobs, the training opportunities for apprenticeships and other training

programs generated by the project and the number and value of subcontracts generated for Virginia subcontractors.

- 2. Community support or opposition, or both;
- 3. Public involvement strategy;
- 4. Compatibility with existing and planned facilities; and
- 5. Compatibility with local, regional, and state economic development efforts.

VIII. Comprehensive Agreement

The Governor, upon advice from interested and affected members of the Governor's cabinet, shall approve any comprehensive agreement entered into pursuant to the PPEA between the Commonwealth and a private provider. The Commonwealth shall accept no liability for acquiring, designing, constructing, improving, renovating, expanding, equipping, maintaining, or operating the qualifying project prior to entering into a properly executed comprehensive agreement. Each comprehensive agreement shall define the rights and obligations of the responsible public entity and the selected proposer with regard to the project.

The terms of the comprehensive agreement shall include but not be limited to:

- 1. The delivery of maintenance, performance and payment bonds or letters of credit in connection with any acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project;
- 2. The review of plans and specifications for the qualifying project by the Commonwealth, it agencies or instrumentalities;
- 3. The rights of the Commonwealth to inspect the qualifying project to ensure compliance with the comprehensive agreement;
- 4. The maintenance of a policy or policies of liability insurance or self-insurance reasonably sufficient to insure coverage of the project and the tort liability to the public and employees and to enable the continued operation of the qualifying project;
- 5. The monitoring of the practices of the operator by the Commonwealth, its agencies or instrumentalities to ensure proper maintenance;

- 6. The terms under which the operator will reimburse the Commonwealth for services provided;
- 7. The policy and procedures that will govern the rights and responsibilities of the Commonwealth and the operator in the event that the comprehensive agreement is terminated or there is a material default by the operator including the conditions governing assumption of the duties and responsibilities of the operator by the state agency or institution and the transfer or purchase of property or other interests of the operator by the responsible public entity;
- 8. The terms under which the operator will file appropriate financial statements on a periodic basis;
- 9. The mechanism by which user fees, lease payments, or service payments, if any, may be established from time to time upon agreement of the parties. Any payments or fees shall be set at a level that is the same for persons using the facility under like conditions and that will not materially discourage use for the qualifying project;
 - a. A copy of any service contract shall be filed with the Commonwealth.
 - b. A schedule of the current user fees or lease payments shall be made available by the operator to any member of the public upon request.
 - c. Classifications according to reasonable categories for assessment of user fees may be made.
- 10. The terms and conditions under which the responsible public entity may contribute financial resources, if any, for the qualifying project;
- 11. A periodic reporting procedure that incorporates a description of the impact of the project on the Commonwealth; and
- 12. Such other terms as the Commonwealth may find necessary and convenient, that are agreed to by the private partner(s).

Any changes in the terms of the comprehensive agreement as may be agreed upon by the parties from time to time shall be added to the comprehensive agreement by written amendment.

Parties submitting proposals understand that representations, information and data supplied in support of, or in connection with proposals plays a critical role in the competitive evaluation process and in the ultimate selection of a proposal by the Commonwealth. Accordingly, as part of the Comprehensive Agreement, the prospective operator and its team members shall certify that all material representations, information and data provided in support of, or in connection with, a proposal is true and correct.

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Such certifications shall be made by authorized individuals who have knowledge of the information provided in the proposal. In the event that material changes occur with respect to any representations, information or data provided for a proposal, the prospective operator shall immediately notify the Commonwealth of same. Any violation of this section of the Comprehensive Agreement shall give the Commonwealth the right to terminate the Agreement, withhold payment or other consideration due, and seek any other remedy available under the law.

CHAPTER 571

An Act to amend and reenact § 2.2-3705 of the Code of Virginia and to amend the Code of Virginia by adding in Title 56 a chapter numbered 22.1, consisting of sections numbered 56-575.1 through 56-575.16, relating to the Public-Private Education Facilities and Infrastructure Act of 2002.

[S 681] Approved April 6, 2002

Be it enacted by the General Assembly of Virginia:

- 1. That § 2.2-3705 of the Code of Virginia is amended and reenacted and the Code of Virginia is amended by adding in Title 56 a chapter numbered 22.1, consisting of sections numbered 56-575.1 through 56-575.16, as follows:
- § <u>2.2-3705</u>. Exclusions to application of chapter.
- A. The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:
- 1. Confidential records of all investigations of applications for licenses and permits, and all licensees and permittees made by or submitted to the Alcoholic Beverage Control Board, the State Lottery Department, the Virginia Racing Commission, or the Charitable Gaming Commission.
- 2. State income, business, and estate tax returns, personal property tax returns, scholastic and confidential records held pursuant to § 58.1-3.
- 3. Scholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or the parent or legal guardian of the student. However, no student shall have access to (i) financial records of a parent or guardian or (ii) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto, which are in the sole possession of the maker thereof and that are not accessible or revealed to any other person except a substitute.

The parent or legal guardian of a student may prohibit, by written request, the release of any individual information regarding that student until the student reaches the age of eighteen years. For scholastic records of students under the age of eighteen years, the right of access may be asserted only by his legal guardian or parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For scholastic records of students who are emancipated or attending a state-supported institution of higher education, the right of access may be asserted by the student.

Any person who is the subject of any scholastic record and who is eighteen years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such records for inspection and copying.

- 4. Personnel records containing information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of any personnel record and who is eighteen years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such records for inspection and copying.
- 5. Medical and mental records, except that such records may be personally reviewed by the subject person or a physician of the subject person's choice. However, the subject person's mental records may not be personally reviewed by such person when the subject person's treating physician has made a part of such person's records a written statement that in his opinion a review of such records by the subject person would be injurious to the subject person's physical or mental health or well-being.

Where the person who is the subject of medical records is confined in a state or local correctional facility, the administrator or chief medical officer of such facility may assert such confined person's right of access to the medical records if the administrator or chief medical officer has reasonable cause to believe that such confined person has an infectious disease or other medical condition from which other persons so confined need to be protected. Medical records shall only be reviewed and shall not be copied by such administrator or chief medical officer. The information in the medical records of a person so confined shall continue to be confidential and shall not be disclosed by the administrator or chief medical officer of the facility to any person except the subject or except as provided by law.

For the purposes of this chapter, statistical summaries of incidents and statistical data concerning patient abuse as may be compiled by the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services shall be open to inspection and copying as provided in § 2.2-3704. No such summaries or data shall include any patient-identifying information. Where the person who is the subject of medical and mental records is under the age of eighteen, his right of access may be asserted only by his guardian or his parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. In instances where the person who is the subject thereof is an emancipated minor or a student in a public institution of higher education, the right of access may be asserted by the subject person.

6. Working papers and correspondence of the Office of the Governor; Lieutenant Governor; the Attorney General; the members of the General Assembly or the Division of Legislative Services; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in Virginia. However, no record which is otherwise open to inspection under this chapter shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence.

As used in this subdivision:

"Working papers" means those records prepared by or for an above-named public official for his personal or deliberative use.

"Office of the Governor" means the Governor; his chief of staff, counsel, director of policy, Cabinet Secretaries, and the Director of the Virginia Liaison Office; and those individuals to whom the Governor has delegated his authority pursuant to § 2.2-104.

- 7. Written advice of legal counsel to state, regional or local public bodies or public officials and any other records protected by the attorney-client privilege.
- 8. Legal memoranda and other work product compiled specifically for use in litigation or for use in an active administrative investigation concerning a matter that is properly the subject of a closed meeting under § 2.2-3711.
- 9. Confidential letters and statements of recommendation placed in the records of educational agencies or institutions respecting (i) admission to any educational agency or institution, (ii) an application for employment, or (iii) receipt of an honor or honorary recognition.
- 10. Library records that can be used to identify both (i) any library patron who has borrowed material from a library and (ii) the material such patron borrowed.
- 11. Any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by a public body.

As used in this subdivision, "test or examination" shall include (i) any scoring key for any such test or examination and (ii) any other document that would jeopardize the security of the test or examination.

Nothing contained in this subdivision shall prohibit the release of test scores or results as provided by law, or limit access to individual records as provided by law. However, the subject of such employment tests shall be entitled to review and inspect all records relative to his performance on such employment tests.

When, in the reasonable opinion of such public body, any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, the test or examination shall be made available to the public. However, minimum competency tests administered to public school children shall be made available to the public contemporaneously with statewide release of the scores of those taking such tests, but in no event shall such tests be made available to the public later than six months after the administration of such tests.

- 12. Applications for admission to examinations or for licensure and scoring records maintained by the Department of Health Professions or any board in that department on individual licensees or applicants. However, such material may be made available during normal working hours for copying, at the requester's expense, by the individual who is the subject thereof, in the offices of the Department of Health Professions or in the offices of any health regulatory board, whichever may possess the material.
- 13. Records of active investigations being conducted by the Department of Health Professions or by any health regulatory board in the Commonwealth.
- 14. Records recorded in or compiled exclusively for use in closed meetings lawfully held pursuant to § 2.2-3711. However, no record that is otherwise open to inspection under this chapter shall be deemed exempt by virtue of the fact that it has been reviewed or discussed in a closed meeting.
- 15. Reports, documentary evidence and other information as specified in §§ 2.2-706 and 63.1-55.4.
- 16. Proprietary information gathered by or for the Virginia Port Authority as provided in § <u>62.1-132.4</u> or § <u>62.1-134.1</u>.
- 17. Contract cost estimates prepared for the confidential use of the Department of Transportation in awarding contracts for construction or the purchase of goods or services, and records and automated systems prepared for the Department's Bid Analysis and Monitoring Program.
- 18. Vendor proprietary information software that may be in the official records of a public body. For the purpose of this subdivision, "vendor proprietary software" means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.
- 19. Financial statements not publicly available filed with applications for industrial development financings.
- 20. Data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information has not been publicly released, published, copyrighted or patented.
- 21. Lists of registered owners of bonds issued by a political subdivision of the Commonwealth, whether the lists are maintained by the political subdivision itself or by a single fiduciary designated by the political subdivision.
- 22. Confidential proprietary records, voluntarily provided by private business pursuant to a promise of confidentiality from the Department of Business Assistance, the Virginia Economic Development Partnership, the Virginia Tourism Authority, or local or regional industrial or economic development authorities or organizations, used by the Department, the Partnership, the Authority, or such entities for business, trade and tourism development; and memoranda, working papers or other records related to businesses that are considering locating or expanding in Virginia, prepared by the Partnership, where

competition or bargaining is involved and where, if such records are made public, the financial interest of the governmental unit would be adversely affected.

- 23. Information that was filed as confidential under the Toxic Substances Information Act (§ <u>32.1-239</u> et seq.), as such Act existed prior to July 1, 1992.
- 24. Confidential records, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses.
- 25. Computer software developed by or for a state agency, state-supported institution of higher education or political subdivision of the Commonwealth.
- 26. Investigator notes, and other correspondence and information, furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to the Department of Human Resource Management. However, nothing in this section shall prohibit the disclosure of information taken from inactive reports in a form that does not reveal the identity of charging parties, persons supplying the information or other individuals involved in the investigation.
- 27. Fisheries data that would permit identification of any person or vessel, except when required by court order as specified in § 28.2-204.
- 28. Records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1.
- 29. Records and writings furnished by a member of the General Assembly to a meeting of a standing committee, special committee or subcommittee of his house established solely for the purpose of reviewing members' annual disclosure statements and supporting materials filed under § 30-110 or of formulating advisory opinions to members on standards of conduct, or both.
- 30. Customer account information of a public utility affiliated with a political subdivision of the Commonwealth, including the customer's name and service address, but excluding the amount of utility service provided and the amount of money paid for such utility service.
- 31. Investigative notes and other correspondence and information furnished in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory practice under the Virginia Human Rights Act (§ 2.2-3900 et seq.) or under any local ordinance adopted in accordance with the authority specified in § 2.2-2638, or adopted pursuant to § 15.2-965, or adopted prior to July 1, 1987, in accordance with applicable law, relating to local human rights or human relations commissions. However, nothing in this section shall prohibit the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information.
- 32. Investigative notes; proprietary information not published, copyrighted or patented; information obtained from employee personnel records; personally identifiable information regarding residents, clients or other recipients of services; and other correspondence and information furnished in confidence to the Department of Social Services in connection with an active investigation of an applicant or licensee pursuant to Chapters 9 (§ 63.1-172 et seq.) and 10 (§ 63.1-195 et seq.) of Title 63.1. However, nothing in this section shall prohibit disclosure of information from the records of completed investigations in a form that does not reveal the identity of complainants, persons supplying information, or other individuals involved in the investigation.
- 33. Personal information, as defined in § 2.2-3801, (i) filed with the Virginia Housing Development Authority concerning individuals who have applied for or received loans or other housing assistance or who have applied for occupancy of or have occupied housing financed, owned or otherwise assisted by the Virginia Housing Development Authority; (ii) concerning persons participating in or persons on the waiting list for federally funded rent-assistance programs; (iii) filed with any local redevelopment and housing authority created pursuant to § 36-4 concerning persons participating in or persons on the waiting list for

housing assistance programs funded by local governments or by any such authority; or (iv) filed with any local redevelopment and housing authority created pursuant to § <u>36-4</u> or any other local government agency concerning persons who have applied for occupancy or who have occupied affordable dwelling units established pursuant to § <u>15.2-2304</u> or § <u>15.2-2305</u>. However, access to one's own information shall not be denied.

- 34. Records regarding the siting of hazardous waste facilities, except as provided in § 10.1-1441, if disclosure of them would have a detrimental effect upon the negotiating position of a governing body or on the establishment of the terms, conditions and provisions of the siting agreement.
- 35. Appraisals and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease.
- 36. Records containing information on the site specific location of rare, threatened, endangered or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archaeological sites if, in the opinion of the public body that has the responsibility for such information, disclosure of the information would jeopardize the continued existence or the integrity of the resource. This exemption shall not apply to requests from the owner of the land upon which the resource is located.
- 37. Records, memoranda, working papers, graphics, video or audio tapes, production models, data and information of a proprietary nature produced by or for or collected by or for the State Lottery Department relating to matters of a specific lottery game design, development, production, operation, ticket price, prize structure, manner of selecting the winning ticket, manner of payment of prizes to holders of winning tickets, frequency of drawings or selections of winning tickets, odds of winning, advertising, or marketing, where such official records have not been publicly released, published, copyrighted or patented. Whether released, published or copyrighted, all game-related information shall be subject to public disclosure under this chapter upon the first day of sales for the specific lottery game to which it pertains.
- 38. Records of studies and investigations by the State Lottery Department of (i) lottery agents, (ii) lottery vendors, (iii) lottery crimes under §§ 58.1-4014 through 58.1-4018, (iv) defects in the law or regulations that cause abuses in the administration and operation of the lottery and any evasions of such provisions, or (v) the use of the lottery as a subterfuge for organized crime and illegal gambling where such official records have not been publicly released, published or copyrighted. All studies and investigations referred to under clauses (iii), (iv) and (v) shall be open to inspection and copying upon completion of the study or investigation.
- 39. Those portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit that would identify specific trade secrets or other information the disclosure of which would be harmful to the competitive position of the owner or lessee. However, such information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure.
- 40. Records concerning reserves established in specific claims administered by the Department of the Treasury through its Division of Risk Management as provided in Article 5 (§ 2.2-1832 et seq.) of Chapter 18 of this title, or by any county, city, or town.
- 41. Information and records collected for the designation and verification of trauma centers and other specialty care centers within the Statewide Emergency Medical Services System and Services pursuant to Article 2.1 (§ 32.1-111.1 et seq.) of Chapter 4 of Title 32.1.
- 42. Reports and court documents required to be kept confidential pursuant to § <u>37.1-67.3</u>.
- 43. Investigative notes, correspondence and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute, provided to or produced by or for the (i) Auditor of Public Accounts; (ii) Joint Legislative Audit and Review Commission; (iii) Department of the State Internal Auditor with respect to an investigation initiated through the State Employee Fraud, Waste and Abuse

Hotline; or (iv) committee or the auditor with respect to an investigation or audit conducted pursuant to § 15.2-825. Records of completed investigations shall be disclosed in a form that does not reveal the identity of the complainants or persons supplying information to investigators. Unless disclosure is prohibited by this section, the records disclosed shall include, but not be limited to, the agency involved, the identity of the person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person.

- 44. Data formerly required to be submitted to the Commissioner of Health relating to the establishment of new or the expansion of existing clinical health services, acquisition of major medical equipment, or certain projects requiring capital expenditures pursuant to former § 32.1-102.3:4.
- 45. Documentation or other information that describes the design, function, operation or access control features of any security system, whether manual or automated, which is used to control access to or use of any automated data processing or telecommunications system.
- 46. Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections provided to the Department of Rail and Public Transportation, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration.
- 47. In the case of corporations organized by the Virginia Retirement System (i) proprietary information provided by, and financial information concerning, coventurers, partners, lessors, lessees, or investors and (ii) records concerning the condition, acquisition, disposition, use, leasing, development, coventuring, or management of real estate, the disclosure of which would have a substantial adverse impact on the value of such real estate or result in a competitive disadvantage to the corporation or subsidiary.
- 48. Confidential proprietary records related to inventory and sales, voluntarily provided by private energy suppliers to the Department of Mines, Minerals and Energy, used by that Department for energy contingency planning purposes or for developing consolidated statistical information on energy supplies.
- 49. Confidential proprietary information furnished to the Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et seq.) of Chapter 10 of Title 32.1.
- 50. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by a private transportation business to the Virginia Department of Transportation and the Department of Rail and Public Transportation for the purpose of conducting transportation studies needed to obtain grants or other financial assistance under the Transportation Equity Act for the 21st Century (P.L. 105-178) for transportation projects, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration. However, the exemption provided by this subdivision shall not apply to any wholly owned subsidiary of a public body.
- 51. Names and addresses of subscribers to Virginia Wildlife magazine, published by the Department of Game and Inland Fisheries, provided the individual subscriber has requested in writing that the Department not release such information.
- 52. Information required to be provided pursuant to § <u>54.1-2506.1</u>.
- 53. Confidential information designated as provided in subsection D of § 2.2-4342 as trade secrets or proprietary information by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.

- 54. All information and records acquired during a review of any child death by the State Child Fatality Review team established pursuant to § 32.1-283.1, during a review of any child death by a local or regional child fatality review team established pursuant to § 32.1-283.2, and all information and records acquired during a review of any death by a family violence fatality review team established pursuant to § 32.1-283.3.
- 55. Financial, medical, rehabilitative and other personal information concerning applicants for or recipients of loan funds submitted to or maintained by the Assistive Technology Loan Fund Authority under Chapter 11 (§ 51.5-53 et seq.) of Title 51.5.
- 56. Confidential proprietary records that are voluntarily provided by a private entity pursuant to a proposal filed with a public entity under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), pursuant to a promise of confidentiality from the responsible public entity, used by the responsible public entity for purposes related to the development of a qualifying transportation facility or qualifying project; and memoranda, working papers or other records related to proposals filed under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002, where, if such records were made public, the financial interest of the public or private entity involved with such proposal or the process of competition or bargaining would be adversely affected. In order for confidential proprietary information to be excluded from the provisions of this chapter, the private entity shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reasons why protection is necessary. For the purposes of this subdivision, the terms "public entity" and "private entity" shall be defined as they are defined in the Public-Private Transportation Act of 1995 or in the Public-Private Education Facilities and Infrastructure Act of 2002.
- 57. Records of law-enforcement agencies, to the extent that such records contain specific tactical plans, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public; or records of emergency service agencies to the extent that such records contain specific tactical plans relating to antiterrorist activity.
- 58. All records of the University of Virginia or the University of Virginia Medical Center that contain proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center, including its business development or marketing strategies and its activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would be harmful to the competitive position of the Medical Center.
- 59. Patient level data collected by the Board of Health and not yet processed, verified, and released, pursuant to § 32.1-276.9, to the Board by the nonprofit organization with which the Commissioner of Health has contracted pursuant to § 32.1-276.4.
- 60. Records of the Virginia Commonwealth University Health System Authority pertaining to any of the following: an individual's qualifications for or continued membership on its medical or teaching staffs; proprietary information gathered by or in the possession of the Authority from third parties pursuant to a promise of confidentiality; contract cost estimates prepared for confidential use in awarding contracts for construction or the purchase of goods or services; data, records or information of a proprietary nature produced or collected by or for the Authority or members of its medical or teaching staffs; financial statements not publicly available that may be filed with the Authority from third parties; the identity, accounts or account status of any customer of the Authority; consulting or other reports paid for by the Authority to assist the Authority in connection with its strategic planning and goals; and the determination of marketing and operational strategies where disclosure of such strategies would be harmful to the competitive position of the Authority; and data, records or information of a proprietary nature produced or collected by or for employees of the Authority, other than the Authority's financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the Authority alone or in conjunction with a governmental body or a private

concern, when such data, records or information have not been publicly released, published, copyrighted or patented.

- 61. Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity to the Virginia Resources Authority or to a fund administered in connection with financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such information were made public, the financial interest of the private person or entity would be adversely affected, and, after June 30, 1997, where such information was provided pursuant to a promise of confidentiality.
- 62. Confidential proprietary records that are provided by a franchisee under § 15.2-2108 to its franchising authority pursuant to a promise of confidentiality from the franchising authority that relates to the franchisee's potential provision of new services, adoption of new technologies or implementation of improvements, where such new services, technologies or improvements have not been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such records were made public, the competitive advantage or financial interests of the franchisee would be adversely affected. In order for confidential proprietary information to be excluded from the provisions of this chapter, the franchisee shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reason why protection is necessary.
- 63. Records of the Intervention Program Committee within the Department of Health Professions, to the extent such records may identify any practitioner who may be, or who is actually, impaired to the extent disclosure is prohibited by § 54.1-2517.
- 64. Records submitted as a grant application, or accompanying a grant application, to the Commonwealth Neurotrauma Initiative Advisory Board pursuant to Article 12 (§ 32.1-73.1 et seq.) of Chapter 2 of Title 32.1, to the extent such records contain (i) medical or mental records, or other data identifying individual patients or (ii) proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical or scholarly issues, when such information has not been publicly released, published, copyrighted or patented, if the disclosure of such information would be harmful to the competitive position of the applicant.
- 65. Information that would disclose the security aspects of a system safety program plan adopted pursuant to 49 C.F.R. Part 659 by the Commonwealth's designated Rail Fixed Guideway Systems Safety Oversight agency; and information in the possession of such agency, the release of which would jeopardize the success of an ongoing investigation of a rail accident or other incident threatening railway safety.
- 66. Documents and other information of a proprietary nature furnished by a supplier of charitable gaming supplies to the Charitable Gaming Commission pursuant to subsection E of § 18.2-340.34.
- 67. Personal information, as defined in § 2.2-3801, provided to the Board of the Virginia College Savings Plan or its employees by or on behalf of individuals who have requested information about, applied for, or entered into prepaid tuition contracts or savings trust account agreements pursuant to Chapter 4.9 (§ 23-38.75 et seq.) of Title 23. Nothing in this subdivision shall be construed to prohibit disclosure or publication of information in a statistical or other form that does not identify individuals or provide personal information. Individuals shall be provided access to their own personal information.
- 68. Any record copied, recorded or received by the Commissioner of Health in the course of an examination, investigation or review of a managed care health insurance plan licensee pursuant to §§ 32.1-137.4 and 32.1-137.5, including books, records, files, accounts, papers, documents, and any or all computer or other recordings.
- 69. Engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security or employee safety of (i) the Virginia Museum

- of Fine Arts or any of its warehouses; (ii) any government store or warehouse controlled by the Department of Alcoholic Beverage Control; (iii) any courthouse, jail, detention or law-enforcement facility; or (iv) any correctional or juvenile facility or institution under the supervision of the Department of Corrections or the Department of Juvenile Justice.
- 70. Records and reports related to Virginia apple producer sales provided to the Virginia State Apple Board pursuant to §§ 3.1-622 and 3.1-624.
- 71. Records of the Department of Environmental Quality, the State Water Control Board, State Air Pollution Control Board or the Virginia Waste Management Board relating to (i) active federal environmental enforcement actions that are considered confidential under federal law and (ii) enforcement strategies, including proposed sanctions for enforcement actions. Upon request, such records shall be disclosed after a proposed sanction resulting from the investigation has been proposed to the director of the agency. This subdivision shall not be construed to prohibit the disclosure of records related to inspection reports, notices of violation, and documents detailing the nature of any environmental contamination that may have occurred or similar documents.
- 72. As it pertains to any person, records related to the operation of toll facilities that identify an individual, vehicle, or travel itinerary including, but not limited to, vehicle identification data, vehicle enforcement system information; video or photographic images; Social Security or other identification numbers appearing on driver's licenses; credit card or bank account data; home addresses; phone numbers; or records of the date or time of toll facility use.
- 73. Records of the Department for Rights of Virginians with Disabilities consisting of documentary evidence received or maintained by the Department or its agents in connection with specific complaints or investigations, and records of communications between employees and agents of the Department and its clients or prospective clients concerning specific complaints, investigations or cases. Upon the conclusion of an investigation of a complaint, this exclusion shall no longer apply, but the Department may not at any time release the identity of any complainant or person with mental illness, mental retardation, developmental disabilities or other disability, unless (i) such complainant or person or his legal representative consents in writing to such identification or (ii) such identification is required by court order.
- 74. Information furnished in confidence to the Department of Employment Dispute Resolution with respect to an investigation, consultation, or mediation under Chapter 10 (§ 2.2-1000 et seq.) of this title, and memoranda, correspondence and other records resulting from any such investigation, consultation or mediation. However, nothing in this section shall prohibit the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information.
- 75. Trade secrets, as defined in the Uniform Trade Secrets Act (§ <u>59.1-336</u> et seq.) of Title 59.1, submitted by CMRS providers as defined in § <u>56-484.12</u> to the Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to § <u>56-484.15</u>, relating to the provision of wireless E-911 service.
- 76. Records of the State Lottery Department pertaining to (i) the social security number, tax identification number, state sales tax number, home address and telephone number, personal and lottery banking account and transit numbers of a retailer, and financial information regarding the nonlottery operations of specific retail locations, and (ii) individual lottery winners, except that a winner's name, hometown, and amount won shall be disclosed.
- 77. Records, information and statistical registries required to be kept confidential pursuant to §§ <u>63.1-53</u> and 63.1-209.
- B. Neither any provision of this chapter nor any provision of Chapter 38 (§ 2.2-3800 et seq.) of this title shall be construed as denying public access to (i) contracts between a public official and a public body, other than contracts settling public employee employment disputes held confidential as personnel records under subdivision 4. of subsection A; (ii) records of the position, job classification, official salary or rate of

pay of, and records of the allowances or reimbursements for expenses paid to any officer, official or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees. The provisions of this subsection, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less.

C. No provision of this chapter or Chapter 21 (§ 30-178 et seq.) of Title 30 shall be construed to afford any rights to any person incarcerated in a state, local or federal correctional facility, whether or not such facility is (i) located in the Commonwealth or (ii) operated pursuant to the Corrections Private Management Act (§ 53.1-261 et seq.). However, this subsection shall not be construed to prevent an incarcerated person from exercising his constitutionally protected rights, including, but not limited to, his rights to call for evidence in his favor in a criminal prosecution.

CHAPTER 22.1.

THE PUBLIC-PRIVATE EDUCATION FACILITIES AND INFRASTRUCTURE ACT OF 2002.

§ <u>56-575.1</u>. *Definitions*.

As used in this chapter, unless the context requires a different meaning:

"Affected local jurisdiction" means any county, city or town in which all or a portion of a qualifying project is located.

"Commission" means the State Corporation Commission.

"Comprehensive agreement" means the comprehensive agreement between the operator and the responsible public entity required by § <u>56-575.9</u>.

"Lease payment" means any form of payment, including a land lease, by a public entity to the operator for the use of a qualifying project.

"Material default" means any default by the operator in the performance of its duties under subsection E of § 56-575.8 that jeopardizes adequate service to the public from a qualifying project.

"Operator" means the private or other non-governmental entity that is responsible for any and all of the stages of a qualifying project, or a portion thereof, including (i) acquisition, (ii) design, (iii) construction, (iv) improvement, (v) renovation, (vi) expansion, (vii) equipping, (viii) maintenance and (ix) operation.

"Private entity" means any natural person, corporation, limited liability company, partnership, joint venture or other private business entity.

"Public entity" means the Commonwealth and any agency or authority thereof, any county, city or town and any other political subdivision of the Commonwealth or any regional entity that serves a public purpose.

"Qualifying project" means (i) any education facility, including, but not limited to a school building, any functionally related and subordinate facility and land to a school building (including any stadium or other facility primarily used for school events), and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education; (ii) any building or facility for principal use by any public entity; (iii) any improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity; (iv) utility and telecommunications and other communications infrastructure; or (v) a recreational facility.

"Responsible public entity" means a public entity that has the power to acquire, design, construct, improve, renovate, expand, equip, maintain, or operate the applicable qualifying project.

"Revenues" means user fees, lease payments, or other service payments generated by a qualifying project.

"Service contract" means a contract entered into between a public entity and the operator pursuant to § <u>56-575.5</u>.

"Service payments" means payments to the operator of a qualifying project pursuant to a service contract.

"State" means the Commonwealth of Virginia.

"User fees" mean the rates, fees or other charges imposed by the operator of a qualifying project for use of all or a portion of such qualifying project pursuant to the comprehensive agreement pursuant to § $\underline{56}$ -575.9.

§ 56-575.2. Declaration of public purpose.

A. The General Assembly finds that:

- 1. There is a public need for timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of education facilities and other public infrastructure and government facilities within the Commonwealth that serve a public need and purpose;
- 2. Such public need may not be wholly satisfied by existing methods of procurement in which qualifying projects are acquired, designed, constructed, improved, renovated, expanded, equipped, maintained, or operated;
- 3. There are inadequate resources to develop new education facilities and other public infrastructure and government facilities for the benefit of citizens of the Commonwealth, and there is demonstrated evidence that public-private partnerships can meet these needs by improving the schedule for delivery, lowering the cost, and providing other benefits to the public;
- 4. Financial incentives exist under state and federal tax provisions that promote public entities to enter into partnerships with private entities to develop qualifying projects; and
- 5. Authorizing private entities to acquire, design, construct, improve, renovate, expand, equip, maintain, or operate one or more qualifying projects may result in the availability of such projects to the public in a more timely or less costly fashion, thereby serving the public safety, benefit, and welfare.
- B. An action under § 56-575.4 shall serve the public purpose of this chapter if such action facilitates the timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of qualifying projects.
- C. It is the intent of this chapter, among other things, to facilitate the bond financing provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 or other similar financing mechanisms, private capital and other funding sources that support the acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of qualifying projects, to the end that financing for qualifying projects be expanded and accelerated to improve and add to the convenience of the public, and such that public and private entities may have the greatest possible flexibility in contracting with each other for the provision of the public services that are the subject of this chapter.
- D. This chapter shall be liberally construed in conformity with the purposes hereof.

§ <u>56-575.3</u>. Prerequisite for operation of a qualifying project.

Any private entity seeking authorization under this chapter to acquire, design, construct, improve, renovate, expand, equip, maintain or operate a qualifying project shall first obtain approval of the responsible public entity under \S 56-575.4. Such private entity may initiate the approval process by requesting approval pursuant to subsection A of \S 56-575.4 or the responsible public entity may request proposals or invite bids pursuant to subsection B of \S 56-575.4.

- § <u>56-575.4</u>. Approval of qualifying projects by the responsible public entity.
- A. A private entity may request approval of a qualifying project by the responsible public entity. Any such request shall be accompanied by the following material and information unless waived by the responsible public entity:
- 1. A topographic map (1:2,000 or other appropriate scale) indicating the location of the qualifying project;
- 2. A description of the qualifying project, including the conceptual design of such facility or facilities or a conceptual plan for the provision of services, and a schedule for the initiation of and completion of the qualifying project to include the proposed major responsibilities and timeline for activities to be performed by both the public and private entity;
- 3. A statement setting forth the method by which the operator proposes to secure any necessary property interests required for the qualifying project. The statement shall include: (i) the names and addresses, if known, of the current owners of the property needed for the qualifying project, (ii) the nature of the property interests to be acquired, and (iii) any property that the responsible public entity expects it will be requested to condemn;
- 4. Information relating to the current plans for development of facilities to be used by a public entity that are similar to the qualifying project being proposed by the private entity, if any, of each affected local jurisdiction;
- 5. A list of all permits and approvals required for the qualifying project from local, state, or federal agencies and a projected schedule for obtaining such permits and approvals;
- 6. A list of public utility facilities, if any, that will be crossed by the qualifying project and a statement of the plans of the operator to accommodate such crossings;
- 7. A statement setting forth the operator's general plans for financing the qualifying project including the sources of the operator's funds;
- 8. The names and addresses of the persons who may be contacted for further information concerning the request;
- 9. User fees, lease payments, and other service payments over the term of the comprehensive agreement pursuant to § 56-575.9 and the methodology and circumstances for changes to such user fees, lease payments, and other service payments over time; and
- 10. Such additional material and information as the responsible public entity may reasonably request.
- B. The responsible public entity may request proposals or invite bids from private entities for the acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance or operation of qualifying projects.
- C. The responsible public entity may grant approval of the acquisition, construction, improvement, renovation, expansion, maintenance, or operation of the education facility or other public infrastructure or government facility needed by a public entity as a qualifying project, or the design or equipping of a qualifying project so acquired, constructed, improved, renovated, expanded, maintained, or operated, if the responsible public entity determines that the project serves the public purpose of this chapter. The responsible public entity may determine that the acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project as a qualifying project serves such public purpose if:
- 1. There is a public need for or benefit derived from the qualifying project of the type the private entity proposes as a qualifying project;

- 2. The estimated cost of the qualifying project is reasonable in relation to similar facilities; and
- 3. The private entity's plans will result in the timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project.

In evaluating any request, the responsible public entity may rely upon internal staff reports prepared by personnel familiar with the operation of similar facilities or the advice of outside advisors or consultants having relevant experience.

- D. The responsible public entity may charge a reasonable fee to cover the costs of processing, reviewing and evaluating the request, including without limitation, reasonable attorney's fees and fees for financial and other necessary advisors or consultants.
- E. The approval of the responsible public entity shall be subject to the private entity's entering into a comprehensive agreement pursuant to \S <u>56-575.9</u> with the responsible public entity.
- F. In connection with its approval of the qualifying project, the responsible public entity shall establish a date for the commencement of activities related to the qualifying project. The responsible public entity may extend such date from time to time.
- G. The responsible public entity shall take appropriate action to protect confidential and proprietary information provided by the operator pursuant to an agreement under subdivision A 56 of \S 2.2-3705.
- H. Nothing in this chapter or in a comprehensive agreement entered into pursuant to this chapter shall be deemed to enlarge, diminish or affect the authority, if any, otherwise possessed by the responsible public entity to take action that would impact the debt capacity of the Commonwealth.
- § 56-575.5. Service contracts.

In addition to any authority otherwise conferred by law, any public entity may contract with an operator for the delivery of services to be provided as part of a qualifying project in exchange for such service payments and other consideration as such public entity may deem appropriate.

§ 56-575.6. Affected local jurisdictions.

A. Any private entity requesting approval from, or submitting a proposal to, a responsible public entity under § <u>56-575.4</u> shall notify each affected local jurisdiction by furnishing a copy of its request or proposal to each affected local jurisdiction.

B. Each affected local jurisdiction that is not a responsible public entity for the respective qualifying project shall, within sixty days after receiving such notice, submit any comments it may have in writing on the proposed qualifying project to the responsible public entity and indicate whether the facility is compatible with the local comprehensive plan, local infrastructure development plans, the capital improvements budget, or other government spending plan. Such comments shall be given consideration by the responsible public entity prior to entering a comprehensive agreement pursuant to § 56-575.9 with a private entity.

§ <u>56-575.7</u>. Dedication of public property.

Any public entity may dedicate any property interest, including land, improvements, and tangible personal property, that it has for public use in a qualifying project if it finds that so doing will serve the public purpose of this chapter by minimizing the cost of a qualifying project to the public entity or reducing the delivery time of a qualifying project. In connection with such dedication, a public entity may convey any property interest that it has, subject to the conditions imposed by general law, to the operator subject to the provisions of this chapter, for such consideration as such public entity may determine. The aforementioned

consideration may include, without limitation, the agreement of the operator to operate the qualifying project.

- § <u>56-575.8</u>. Powers and duties of the operator.
- A. The operator shall have all power allowed by law generally to a private entity having the same form of organization as the operator and shall have the power to acquire, design, construct, improve, renovate, maintain, expand, equip or operate the qualifying project and collect lease payments, impose user fees or enter into service contracts in connection with the use thereof.
- B. The operator may own, lease or acquire any other right to use or operate the qualifying project.
- C. Any financing of the qualifying project may be in such amounts and upon such terms and conditions as may be determined by the operator. Without limiting the generality of the foregoing, the operator may issue debt, equity or other securities or obligations, enter into sale and leaseback transactions and secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including all of its property interests in the qualifying project.
- D. In operating the qualifying project, the operator may:
- 1. Make classifications according to reasonable categories for assessment of user fees; and
- 2. With the consent of the responsible public entity, make and enforce reasonable rules to the same extent that the responsible public entity may make and enforce rules with respect to similar facilities.
- E. The operator shall:
- 1. Acquire, design, construct, improve, renovate, expand, equip, maintain, or operate the qualifying project in a manner that is acceptable to the responsible public entity, all in accordance with the provisions of the comprehensive agreement pursuant to § 56-575.9;
- 2. Keep the qualifying project open for use by the members of the public at all times, or as appropriate based upon the use of the facility, after its initial opening upon payment of the applicable user fees, lease payments, or service payments; provided that the qualifying project may be temporarily closed because of emergencies or, with the consent of the responsible public entity, to protect the safety of the public or for reasonable construction or maintenance procedures;
- 3. Maintain, or provide by contract for the maintenance of the qualifying project, if required by the comprehensive agreement;
- 4. Cooperate with the responsible public entity in making best efforts to establish any interconnection with the qualifying project requested by the responsible public entity; and
- 5. Comply with the provisions of the comprehensive agreement and any service contract.
- F. Nothing shall prohibit an operator of a qualifying project from providing additional services for the qualifying project to public or private entities other than the responsible public entity so long as the provision of additional service does not impair the operator's ability to meet its commitments to the responsible public entity pursuant to the comprehensive agreement as provided for in $\S 56-575.9$.
- § <u>56-575.9</u>. Comprehensive agreement.
- A. Prior to acquiring, designing, constructing, improving, renovating, expanding, equipping, maintaining, or operating the qualifying project, the private entity shall enter into a comprehensive agreement with the responsible public entity. The comprehensive agreement shall provide for:

- 1. Delivery of maintenance, performance and payment bonds or letters of credit in connection with the acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project, in the forms and amounts satisfactory to the responsible public entity;
- 2. Review of plans and specifications for the qualifying project by the responsible public entity and approval by the responsible public entity if the plans and specifications conform to standards acceptable to the responsible public entity. This shall not be construed as requiring the private entity to complete design of a qualifying project prior to the execution of a comprehensive agreement;
- 3. Inspection of the qualifying project by the responsible public entity to ensure that the operator's activities are acceptable to the responsible public entity in accordance with the provisions of the comprehensive agreement;
- 4. Maintenance of a policy or policies of public liability insurance (copies of which shall be filed with the responsible public entity accompanied by proofs of coverage), self-insurance, in form and amount satisfactory to the responsible public entity and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying project;
- 5. Monitoring of the practices of the operator by the responsible public entity to ensure that the qualifying project is properly maintained;
- 6. Reimbursement to be paid to the responsible public entity for services provided by the responsible public entity;
- 7. Filing of appropriate financial statements on a periodic basis; and
- 8. Policies and procedures governing the rights and responsibilities of the responsible public entity and the operator in the event the comprehensive agreement is terminated or there is a material default by the operator. Such policies and procedures shall include conditions governing assumption of the duties and responsibilities of the operator by the responsible public entity and the transfer or purchase of property or other interests of the operator by the responsible public entity.
- B. The comprehensive agreement shall provide for such user fees, lease payments, or service payments as may be established from time to time by agreement of the parties. A copy of any service contract shall be filed with the responsible public entity. In negotiating user fees under this section, the parties shall establish payments or fees that are the same for persons using the facility under like conditions and that will not materially discourage use of the qualifying project. The execution of the comprehensive agreement or any amendment thereto shall constitute conclusive evidence that the user fees, lease payments, or service payments provided for comply with this chapter. User fees or lease payments established in the comprehensive agreement as a source of revenues may be in addition to, or in lieu of, service payments.
- C. In the comprehensive agreement, the responsible public entity may agree to make grants or loans to the operator from time to time from amounts received from the federal, state, or local government or any agency or instrumentality thereof.
- D. The comprehensive agreement shall incorporate the duties of the operator under this chapter and may contain such other terms and conditions that the responsible public entity determines serve the public purpose of this chapter. Without limitation, the comprehensive agreement may contain provisions under which the responsible public entity agrees to provide notice of default and cure rights for the benefit of the operator and the persons specified therein as providing financing for the qualifying project. The comprehensive agreement may contain such other lawful terms and conditions to which the operator and the responsible public entity mutually agree, including, without limitation, provisions regarding unavoidable delays or provisions providing for a loan of public funds to the operator to acquire, design, construct, improve, renovate, expand, equip, maintain or operate one or more qualifying projects. The comprehensive agreement may also contain provisions where the authority and duties of the operator under this chapter shall cease, and the qualifying project is dedicated to the responsible public entity or, if

the qualifying project was initially dedicated by an affected local jurisdiction, to such affected local jurisdiction for public use.

E. Any changes in the terms of the comprehensive agreement, as may be agreed upon by the parties from time to time, shall be added to the comprehensive agreement by written amendment.

F. When a responsible public entity that is not an agency or authority of the Commonwealth enters into a comprehensive agreement pursuant to this chapter, it shall within thirty days thereafter submit a copy of the comprehensive agreement to the Auditor of Public Accounts.

§ <u>56-575.10</u>. Federal, state and local assistance.

The responsible public entity may take any action to obtain federal, state, or local assistance for a qualifying project that serves the public purpose of this chapter and may enter into any contracts required to receive such assistance. If the responsible public entity is a state agency, any funds received from the state or federal government or any agency or instrumentality thereof shall be subject to appropriation by the General Assembly. The responsible public entity may determine that it serves the public purpose of this chapter for all or any portion of the costs of a qualifying project to be paid, directly or indirectly, from the proceeds of a grant or loan made by the local, state, or federal government or any agency or instrumentality thereof.

§ 56-575.11. Material default; remedies.

A. In the event of a material default by the operator, the responsible public entity may elect to assume the responsibilities and duties of the operator of the qualifying project, and in such case, it shall succeed to all of the right, title and interest in such qualifying project, subject to any liens on revenues previously granted by the operator to any person providing financing thereof.

B. Any responsible public entity having the power of condemnation under state law may exercise such power of condemnation to acquire the qualifying project in the event of a material default by the operator. Any person who has provided financing for the qualifying project, and the operator, to the extent of its capital investment, may participate in the condemnation proceedings with the standing of a property owner.

C. The responsible public entity may terminate, with cause, the comprehensive agreement and exercise any other rights and remedies that may be available to it at law or in equity.

D. The responsible public entity may make or cause to be made any appropriate claims under the maintenance, performance, or payment bonds; or lines of credit required by subsection A 1 of § 56-575.9.

E. In the event the responsible public entity elects to take over a qualifying project pursuant to subsection A, the responsible public entity may acquire, design, construct, improve, renovate, operate, expand, equip, or maintain the qualifying project, impose user fees, impose and collect lease payments for the use thereof and comply with any service contracts as if it were the operator. Any revenues that are subject to a lien shall be collected for the benefit of and paid to secured parties, as their interests may appear, to the extent necessary to satisfy the operator's obligations to secured parties, including the maintenance of reserves. Such liens shall be correspondingly reduced and, when paid off, released. Before any payments to, or for the benefit of, secured parties, the responsible public entity may use revenues to pay current operation and maintenance costs of the qualifying project, including compensation to the responsible public entity for its services in operating and maintaining the qualifying project. The right to receive such payment, if any, shall be considered just compensation for the qualifying project. The full faith and credit of the responsible public entity shall not be pledged to secure any financing of the operator by the election to take over the qualifying project. Assumption of operation of the qualifying project shall not obligate the responsible public entity to pay any obligation of the operator from sources other than revenues.

§ <u>56-575.1</u>2. Condemnation.

At the request of the operator, the responsible public entity may exercise any power of condemnation that it has under law for the purpose of acquiring any lands or estates or interests therein to the extent that the responsible public entity finds that such action serves the public purpose of this chapter. Any amounts to be paid in any such condemnation proceeding shall be paid by the operator.

§ <u>56-575.13</u>. Utility crossing.

The operator and each public service company, public utility, railroad, and cable television provider, whose facilities are to be crossed or affected shall cooperate fully with the other entity in planning and arranging the manner of the crossing or relocation of the facilities. Any such entity possessing the power of condemnation is hereby expressly granted such powers in connection with the moving or relocation of facilities to be crossed by the qualifying project or that must be relocated to the extent that such moving or relocation is made necessary or desirable by construction of, renovation to, or improvements to the qualifying project, which shall be construed to include construction of, renovation to, or improvements to temporary facilities for the purpose of providing service during the period of construction or improvement. Any amount to be paid for such crossing, construction, moving or relocating of facilities shall be paid for by the operator. Should the operator and any such public service company, public utility, railroad, and cable television provider not be able to agree upon a plan for the crossing or relocation, the Commission may determine the manner in which the crossing or relocation is to be accomplished and any damages due arising out of the crossing or relocation. The Commission may employ expert engineers who shall examine the location and plans for such crossing or relocation, hear any objections and consider modifications, and make a recommendation to the Commission. In such a case, the cost of the experts is to be borne by the operator. Such determination shall be made by the Commission within ninety days of notification by the private entity that the qualifying project will cross utilities subject to the Commission's jurisdiction.

§ 56-575.14. Police powers; violations of law.

All police officers of the Commonwealth and of each affected local jurisdiction shall have the same powers and jurisdiction within the limits of such qualifying project as they have in their respective areas of jurisdiction and such police officers shall have access to the qualifying project at any time for the purpose of exercising such powers and jurisdiction.

§ <u>56-575.15</u>. Sovereign immunity.

Nothing in this chapter shall be construed as or deemed a waiver of the sovereign immunity of the Commonwealth, any responsible public entity or any affected local jurisdiction or any officer or employee thereof with respect to the participation in, or approval of all or any part of the qualifying project or its operation, including but not limited to interconnection of the qualifying project with any other infrastructure or project. Counties, cities and towns in which a qualifying project is located shall possess sovereign immunity with respect to its design, construction, and operation.

§ <u>56-575.16</u>. Procurement.

The Virginia Public Procurement Act (§ 2.2-4300 et seq.) and any interpretations, regulations, or guidelines of the Division of Engineering and Buildings of the Department of General Services, including the Capital Outlay Manual and those interpretations, regulations or guidelines developed pursuant to §§ 2.2-1131, 2.2-1132, 2.2-1133, 2.2-1149, and 2.2-1502, except those developed by the Division in accordance with this chapter when the Commonwealth is the responsible public entity, shall not apply to this chapter. However, a responsible public entity may enter into a comprehensive agreement only in accordance with procedures adopted by it as follows:

1. A responsible public entity may enter into a comprehensive agreement in accordance with procedures adopted by it that are consistent with procurement through competitive sealed bidding as defined in \S 2.2-4301 and subsection B of \S 2.2-4310.

- 2. A responsible public entity may enter into a comprehensive agreement in accordance with procedures adopted by it that are consistent with the procurement of "other than professional services" through competitive negotiation as defined in § 2.2-4301 and subsection B of § 2.2-4310. Such responsible public entity shall not be required to select the proposal with the lowest price offer, but may consider price as one factor in evaluating the proposals received. A responsible public entity shall proceed in accordance with the procedures adopted by it pursuant to subdivision 1 unless it determines that proceeding in accordance with the procedures adopted by it pursuant to this subdivision is likely to be advantageous to the responsible public entity and the public, based on (i) the probable scope, complexity or urgency of the project, or (ii) risk sharing, added value, an increase in funding or economic benefit from the project that would not otherwise be available. When the responsible public entity determines to proceed according to the procedures adopted by it pursuant to this subdivision, it shall state the reasons for its determination in writing. If a state agency is the responsible public entity, the approval of the responsible Governor's Secretary, or the Governor, shall be required before the responsible public entity may enter into a comprehensive agreement pursuant to this subdivision.
- 3. Nothing in this chapter shall authorize or require that a responsible public entity obtain professional services through any process except in accordance with procedures adopted by it that are consistent with the procurement of "professional services" through competitive negotiation as defined in § $\underline{2.2-4301}$ and subsection B of § $\underline{2.2-4310}$.
- 4. A responsible public entity shall not proceed to consider any request by a private entity for approval of a qualifying project pursuant to subsection A of § 56-575.4 until the responsible public entity has adopted and made publicly available procedures that are sufficient to enable the responsible public entity to comply with this chapter. Such procedures shall include provision for the posting and publishing of public notice of a private entity's request for approval of a qualifying project pursuant to subsection A of § 56-575.4 and a reasonable time period, to be no less than forty-five days, during which the responsible public entity will receive competing proposals pursuant to that subsection.
- 5. A responsible public entity that is a school board or a county, city or town may enter into a comprehensive agreement under this chapter only with the approval of the local governing body.
- 2. That it is the intent of the General Assembly that the Governor and the chairs of the General Laws Committees of the Senate and House of Delegates, or their respective designees, will facilitate the development of model procedures to assist in the implementation of this act, that public entities and private sector businesses, including but not limited to construction management firms, contractors, and design professionals, will be consulted in the development of such procedures, and that such model procedures will be completed and made available to public entities covered by this act not later than September 30, 2002.
- 3. That it is the intent of the General Assembly that the Auditor of Public Accounts periodically review the comprehensive agreements approved under this chapter for compliance with this chapter.